

(b) ensure that cable operators do not favor affiliated video programming vendors in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programming vendors to other video distributors;

(c) take account of the market structure, ownership patterns, and other relationships of the cable industry;

(d) take into account any efficiencies and other benefits that might be gained through increased ownership or control;

(e) make rules and regulations that reflect the dynamic nature of the communications marketplace;

(f) impose no limitations that prevent cable operators from serving previously unserved rural areas; and

(g) impose no limitation that will impair the development of diverse and high quality programming.<sup>69</sup>

57. On September 23, 1993, the Commission implemented Section 11(c)(2) of the 1992 Cable Act by prescribing national subscriber limits and channel occupancy limits.<sup>70</sup> The Commission established a thirty (30) percent limit on the number of homes passed nationwide that any one entity can reach through cable systems in which such entity has an attributable interest, and adopted a forty (40) percent limit on the number of channels that can be occupied on a vertically integrated cable system by video programming vendors in which the cable operator has an attributable interest.<sup>71</sup> These limits were intended to promote diversity, and to encourage competitive dealings between cable programming services and cable operators and between cable

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<sup>69</sup> See Communications Act, § 613(f)(2), 47 U.S.C. § 533(f)(2); 1992 Cable Act, § 11(c).

<sup>70</sup> See Second Report and Order in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, ("Second Report and Order on Horizontal and Vertical Ownership Limits,") MM Docket No. 92-264, 8 FCC Rcd 8565 (1993), recon. pending.

<sup>71</sup> To promote diversity of viewpoints, the Commission also adopted rules permitting ownership of additional cable systems, up to thirty-five (35) percent of homes passed nationwide, and allowing carriage of vertically integrated programming on forty-five (45) percent of a system's channel capacity if the system and the programming service, respectively, are minority-controlled.

programming services and competing video distributors.<sup>72</sup> We note that various issues pertaining to these specific limits have been raised in reconsideration petitions.<sup>73</sup>

58. To analyze the status of competition in the multichannel video programming marketplace, we believe it will be useful to compile data that will create a baseline of the current extent of horizontal ownership by MSOs and the current level of vertical integration in the cable programming industry. An appropriate baseline will enable us to track future developments and changes in the distribution of multichannel video programming and may be particularly important given the dynamic and fluid nature of the communications marketplace.

59. As a starting point, we request that commenters provide information necessary to update the information and tables pertaining to horizontal ownership and vertical integration in the cable industry contained in Appendix G of the 1990 Report.<sup>74</sup> In establishing the current subscriber and channel occupancy limits of Sections 76.503 and 76.504 of the Commission's Rules, substantial reliance was placed upon the information set forth in the 1990 Report. In the Second Report and Order on Horizontal and Vertical Ownership Limits, the Commission noted that we will review the subscriber limitations every five years to determine whether the limits are reasonable under prevailing market conditions, and whether the limits continue to serve the objectives for which they were adopted.<sup>75</sup> We believe the creation of a baseline will enable us not only to provide a comprehensive report to Congress pursuant to Section 19(g) of the 1992 Cable Act, but will aid our periodic review of the appropriateness of subscriber limits in accordance with the Second Report and Order.

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<sup>72</sup> The Commission stayed implementation of the horizontal ownership restrictions pending judicial resolution of the U.S. District Court decision in Daniels Cablevision v. United States ("Daniels") that the statutory imposition of horizontal restrictions is unconstitutional. 835 F. Supp. 1 (D.D.C. 1993). The Daniels court, however, upheld the statutory imposition of vertical restrictions. Id. at 12.

<sup>73</sup> See, e.g., Petition for Reconsideration of Center for Media Education and Consumer Federation of America, filed December 15, 1993, and Petition of Bell Atlantic for Limited Reconsideration, filed December 15, 1993, in MM Docket No. 92-264.

<sup>74</sup> Appendix G of the 1990 Report is attached hereto as "Appendix A."

<sup>75</sup> See 8 FCC Rcd at 8583, n. 64.

60. For purposes of submitting the following information and data in order to update the information contained in the 1990 Report, please refer to the attribution rules and definitions utilized in the Commission's rules governing horizontal and vertical ownership.<sup>76</sup> Commenters are requested to provide current information on:

(a) the number of subscribers to cable systems in which each MSO has any interest, reporting separately for systems in which the MSO has both a controlling and non-controlling interest;

(b) the number and identity of cable programming services (exclusive of local origination channels) in which MSOs have an ownership interest;

(c) the names and board affiliations of all of the MSOs' board members who also serve on the boards of other cable, broadcast, program production, or other communications companies (including telecommunications companies);

(d) the identity of all minority-owned and minority-controlled MSOs and cable programming services; and

(e) the identity of the MSOs that hold interests in cable programming services, a description of the amount and type of such interests, and the date on which the interest was acquired, identifying, in particular, any changes that have occurred since passage of the 1992 Cable Act.

61. We propose to gather information on the existence and extent of affiliations, including but not limited to investments, joint ventures, and partnerships, between multichannel video programming distributors and other communications companies. Examples of such affiliations include the investment by U.S. West in Time Warner Entertainment, Comcast's ownership interest in cellular telephone operations, TCI and Microsoft's interactive television test, and the partnership interests of several MSOs in Primestar's<sup>77</sup> direct-to-home satellite service.

62. Commenters are asked to address the relevance and impact of such investments and affiliations on the status of competition in the market for multichannel video programming. To the extent that commenters believe such information is relevant, how should the Commission collect such data in the least burdensome manner? We request comment on whether the Commission can reasonably expect voluntary disclosure of such affiliations.

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<sup>76</sup> See 8 FCC Rcd at 8583.

<sup>77</sup> See n.90, infra.

63. Moreover, now that the Commission has adopted various structural and conduct regulations in compliance with the 1992 Cable Act, we propose examining the impact upon programming services, if any, that has occurred as a result of the interplay between those limitations. Thus, we seek comment on the following questions:

(a) Has leased access provided a carriage outlet for programming services unable to secure carriage on an MSO's system?

(b) Have cable systems' must carry obligations affected unaffiliated programmers' access to carriage?

(c) Have the financial interest and exclusivity rules had any impact upon unaffiliated programming vendors' ability to secure carriage by MSOs?

(d) Has the ability of programming vendors, both affiliated and unaffiliated, to secure carriage, been affected by channel occupancy restrictions?

(e) What aspects of the interplay between subscriber and channel occupancy limits should we examine for purposes of ascertaining impacts upon the development of new programming services?

(f) Are there aspects of the horizontal or vertical ownership limitations, whether working together or independently, that have affected the development of new programming services?

(g) What changes, if any, have occurred in programming vendors' ability to reach desired numbers of subscribers since the adoption of the ownership limitations?

(h) To what extent has MSO investment in programming services been affected by the ownership limitations?

(i) Have subscriber penetration levels of unaffiliated programming services changed?

64. Finally, we propose to seek comment and information on how recent or proposed mergers or partnerships and alliances involving programming vendors, cable operators, or telephone companies will affect the cost, quality and variety of video programming. Specifically,

(a) How will such mergers, partnerships and alliances affect competition between the cable industry and other competing distribution technologies?

(b) How will the entry of competing distribution technologies affect the vertical relationships between cable systems and program suppliers?

(c) In particular, how might such entry affect relationships between cable systems and program suppliers?

(d) What regulatory and antitrust concerns, if any, are raised by such combinations?

**V. Changes in Practices/Conduct of  
Multichannel Video Programming Vendors and Distributors  
Since Passage of the 1992 Cable Act**

65. Because the ability of multichannel video programming distributors to compete effectively depends on their ability to offer video programming that appeals to the marketplace, all distributors need access to desirable, reasonably priced programs. Certain conduct by cable operators and vertically integrated programming vendors can have anticompetitive effects on both programming and distribution markets, since access to programming on fair, reasonable and non-discriminatory terms is essential to the entry and survival of competing distribution technologies. Moreover, programming vendors themselves may be injured when: (a) as a condition of carriage on a particular system, a programming vendor is forced to provide equity participation or exclusivity to a distributor exercising undue market power, or (b) distributors exercising undue market power attempt to interfere with the programming vendor's decision to sell programming to competing distributors.

66. In response to concerns about the effects on the distribution of programming of increased vertical integration and horizontal ownership,<sup>78</sup> Congress sought to include provisions in the 1992 Cable Act that would address the development of competition in the video programming marketplace. Specifically, Congress adopted Sections 12 and 19, which add new Sections 616 and 628 to the Communications Act.

67. Section 628 requires the Commission to prescribe regulations governing access to cable programming services by competing multichannel systems.<sup>79</sup> Section 628(b) prohibits cable operators, vertically integrated satellite cable programming vendors and all satellite broadcast programming vendors from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder

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<sup>78</sup> See, e.g., 1990 Report at 5006, 5008, and 5021.

<sup>79</sup> See Communications Act, § 628; 1992 Cable Act, § 19; 47 U.S.C. § 548.

significantly or to prevent any multichannel video programming distributor from providing satellite [cable or broadcast] programming to subscribers or consumers."<sup>80</sup>

68. Section 628(c) directs the Commission to prescribe regulations that, at a minimum, prohibit (a) a vertically integrated cable operator from unduly or improperly influencing the prices, terms, or conditions of the sale of programming by its affiliated programmer to unaffiliated distributors; (b) discrimination in the prices, terms, and conditions of the sale of satellite cable or broadcast programming to competing distributors; and (c) exclusive contracts except in specified circumstances.<sup>81</sup>

69. Section 616 of the Communications Act governs carriage agreements between cable systems (or other multichannel video programming distributors) and video programming vendors. These provisions are intended to prevent distributors from taking undue advantage of unaffiliated programming vendors.

70. On April 1, 1993, the Commission promulgated program access rules to implement Section 19 of the 1992 Cable Act, which allow multichannel video programming distributors to seek redress at the Commission when they are subject to undue interference, discriminatory prices, terms or conditions, or prohibited exclusionary practices.<sup>82</sup>

71. Furthermore, on September 23, 1993, the Commission adopted regulations to implement Section 12 of the 1992 Cable Act.<sup>83</sup> Pursuant to these regulations, cable operators cannot take undue advantage of programming vendors by coercing them to grant ownership interests or exclusive distribution rights as a condition of carriage on their systems, and also may not retaliate against them for failing to provide exclusive carriage rights. Finally, cable operators cannot engage in conduct that unreasonably restrains the ability of programming vendors

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<sup>80</sup> See Communications Act, § 628(b); 1992 Cable Act, § 19; 47 U.S.C. § 548(b).

<sup>81</sup> See Communications Act, § 628(c); 1992 Cable Act, § 19; 47 U.S.C. § 548(c).

<sup>82</sup> First R & O, 8 FCC Rcd at 3416-3423; 47 C.F.R. §§ 76.1000 et seq.

<sup>83</sup> Second Report and Order in Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, ("Second R&O"), MM Docket No. 92-265, 8 FCC Rcd 3359; (1993), recon. pending.

unaffiliated with the operator from competing fairly with other programming vendors.<sup>84</sup>

72. Through this NOI we seek to determine whether anticompetitive practices in the multichannel video programming and distribution markets have diminished, and whether new and potentially anticompetitive conduct has developed. Following an analysis of the comments we receive, we will report our findings to Congress, and propose appropriate regulatory or legislative action where necessary to ensure that the public interest is served by preserving consumer access to a wide array of multichannel video programming from competing distributors.

73. As an initial matter, we intend to examine whether the anticompetitive conduct, as identified in the 1990 Report and in the legislative history to the 1992 Cable Act, has abated. Thus, we request comment on the extent to which the conduct within the scope of our rules continues. Commenters are asked to support their positions with specific information or examples.<sup>85</sup> In addition, we seek comment on the current ability of distributors employing alternative technologies to compete with cable systems for the purchase of, or for access to, programming services. What changes have occurred with respect to the sources and supply of video programming (1) at the national level; (2) in rural areas; and (3) to cabled areas? Commenters are asked to provide specific facts or examples to support their comments and views. For example, we invite commenters to respond to the following questions:

- (a) How has the conduct of cable operators, competing multichannel video programming distributors, and vertically integrated programming vendors changed? Have such changes brought demonstrable benefits to consumers?
- (b) Can it be argued, or demonstrated, that the mere existence of the statutory provisions and our rules has already affected programming practices and conduct?
- (c) To what extent is previously unavailable programming now available to competing distribution technologies?
- (d) How, if at all, have carriage negotiations changed?

74. We also seek to determine whether anticompetitive

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<sup>84</sup> See 47 C.F.R. § 76.1301.

<sup>85</sup> It may be necessary to omit specific identities to protect the confidential nature of business relationships, although we encourage the fullest possible reporting.

practices that affect the distribution and availability of multichannel video programming, other than those already addressed by the rules, have developed. Accordingly, we ask that commenters describe (supported with specific examples and/or empirical evidence, when possible) specific sales or negotiating practices, other than those already addressed by the program access rules, that have occurred, or may occur, which may have an anticompetitive impact on competing multichannel video programming distributors. Specifically, we ask commenters to address the following:

- (a) Do vertically integrated MSOs currently discriminate against rival programming services in terms of prices charged to subscribers for services? In terms of channel position?
- (b) Do vertically integrated MSOs currently treat rival programming services differently from affiliated services in terms of advertising support or promotion?
- (c) Do vertically integrated MSOs currently discriminate against non-affiliated programming vendors with respect to tiering or packaging of services? With respect to signal quality?
- (d) How does the vertical relationship affect other aspects of access or carriage negotiations?
- (e) Do the practices and incentives involved in the decisions relating to carriage of programming services differ depending on whether the services in question are, at least in part, advertiser supported?

75. To the extent this inquiry may demonstrate or suggest that participants in the cable programming industry continue to engage in the anticompetitive practices identified in the statute and our rules, we invite analyses of the causes and effects of those practices. What are the relevant product and geographic markets affected by these practices? In addition, we seek comments on the relative market shares of cable operators and other distributors that serve those markets. Specifically,

- (a) Who are the actual or potential non-cable competitors for programming in each market?
- (b) What portion of each market is served by other multichannel video programming distributors? How vigorous is the competition for programming among these multichannel video programming distributors?

76. In addition to the conduct/behavior discussed above, we believe that analysis of certain other issues is relevant to an



examination of the status of competition in the market for the delivery of video programming. For example, we ask commenters to identify the current factors used by distributors in making programming carriage decisions. In particular, how does subscriber demand affect cable operator carriage decisions and the carriage decisions of competing technologies? Do distributors currently measure or assess subscriber demand for particular programming services, and if so, how?

77. Finally, to the extent that commenters express continued concerns about the existence of undue market power by cable operators, other multichannel video programming distributors, or vertically integrated programming vendors engaging in conduct that is not expressly encompassed within our rules, we invite commenters to suggest regulatory responses that will address them.

## **VI. Collection of Data for Future Reports**

78. As stated earlier, we intend to rely on the data that is submitted in response to this NOI for purposes of preparing our first report to Congress. For the future, however, we believe that it may be desirable to establish more systematic reporting procedures. Thus, we invite commenters to suggest specific studies, surveys, samplings, methodologies, etc. that the Commission might undertake to gather the information that will enable us to prepare accurate and comprehensive reports. Moreover, we ask commenters to suggest any specific databases that the Commission might develop and maintain to facilitate the preparation of our annual reports.

79. With respect to information related to horizontal ownership and vertical integration, comment is sought on the appropriate methods that the Commission should employ to gather the data necessary to update the charts and tables contained in Appendix G to the 1990 Report. For example, commenters are asked:

- (a) Should the Commission send surveys or questionnaires to particular MSOs and vertically integrated programming vendors? If so, how should the survey audience be selected?
- (b) Should surveys be sent to all cable systems, or to the top 100 systems/MSOs as reported by the trade press?
- (c) How often should the charts and tables contained in Appendix G to the 1990 Report be updated?

80. With respect to the information required for our evaluation of the development of competitive technologies for the delivery of multichannel video programming, we seek comment on the appropriate means of gathering such data. For example,

should the Commission adopt annual reporting requirements for various multichannel video programming distributors and vertically integrated programming vendors? If so, what should those reporting requirements entail?<sup>86</sup> If commenters oppose our imposing such reporting obligations on all multichannel distributors and vertically integrated entities, we ask that they identify appropriate limits on both the amount and type of information collected as well as on whom the reporting obligations are imposed.

81. We believe that our licensing authority over the various multichannel distributors, as well as Section 19(f)(2) and Section 3(g) of the 1992 Cable Act, provides a sufficient legal basis to establish and impose any such reporting requirements with respect to both multichannel distributors and vertically integrated programming vendors.<sup>87</sup> We invite commenters to address this conclusion. We seek comment on ways to reduce the burdens that may be imposed on the regulated parties by such reporting requirements. In this regard, we ask commenters to address specifically what types of burdens would imposition of each proposed reporting requirement place on the affected industries and on the Commission? What are the advantages that may be gained by both regulators and consumers in gathering such information? Would the advantages outweigh the burdens?

82. How much of this information is already provided to the Commission through existing reports or applications, such as applications for assignment or transfers of control of Cable Antenna Relay Service ("CARS") licenses? Alternatively, what information is available through public sources, and what are those sources? How often are they updated?

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<sup>86</sup> The Commission has previously indicated its intention to initiate a rulemaking proceeding proposing that competitors to cable television be required to file with the Commission annual registration statements providing data with respect to reach and penetration. See Rate Order, 8 FCC Rcd 5670 n. 145 (1993). Similarly, relevant information from programming vendors could include aggregate totals of programming sold to the various types of multichannel video programming distributors, and the numbers of subscribers (where available) receiving the programming from each type of distributor.

<sup>87</sup> See e.g., 47 U.S.C. § 548(f)(2), and 47 U.S.C. § 543(g). We note that the Commission has not yet specified the appropriate reporting requirements that will be required of cable operators to comply with Section 3(g). See Notice of Proposed Rulemaking in Implementation of Sections of the Cable Television, Consumer Protection and Competition Act of 1992; Rate Regulation, MM Docket No. 93-215, 58 F.R. 40762 (July 30, 1993).

83. Further, we ask commenters to consider the extent to which any of the information sought for our report might be similar to information already collected by the relevant parties for other purposes related to our implementation and enforcement of the 1992 Cable Act. For example, we note that in connection with the adoption of channel occupancy limits pursuant to Section 11 of the 1992 Cable Act, Section 76.504(e) of the Commission's Rules requires cable operators to maintain various records for at least three years in their public files.<sup>88</sup> Such records must be available to local franchising authorities, the Commission, or members of the public on reasonable notice and during regular business hours.<sup>89</sup>

84. Our rules do not further elaborate on the precise type, manner, form or time frame for how the required information should be maintained. We seek comment from cable operators subject to this record maintenance requirement (and from franchising authorities who are primarily responsible for monitoring cable operator compliance with the channel occupancy rules) on the records anticipated to be compiled and maintained, and whether any additional burden would exist if we require the filing of such records with the Commission. Should such records be maintained at the Commission and how often should they be updated?

85. Similarly, a number of vertically integrated MSOs already have agreed to significant annual reporting requirements with respect to program distribution in connection with their participation in the Primestar medium-power DBS service.<sup>90</sup> Primestar entered into a consent decree with the Department of Justice to settle antitrust litigation involving cable programming access by distributors that compete with the partner MSOs. In addition, Primestar and its partners, excluding Viacom, entered into a consent decree with the Attorneys General of forty states to settle concurrent antitrust litigation ("Primestar Decree"). Viacom entered into a separate consent decree with the forty Attorneys General ("Viacom Decree").<sup>91</sup>

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<sup>88</sup> See 47 C.F.R. § 76.504(e).

<sup>89</sup> Id.

<sup>90</sup> See III(B)(1), supra. The seven cable MSO partners who originally invested in Primestar were Comcast Corporation, Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corporation, Tele-Communications, Inc., Time Warner, Inc., and Viacom, Inc. (the "Primestar Partners").

<sup>91</sup> State of New York ex rel Abrams v. Primestar Partners, L.P., 1993-2 Trade Cases ¶¶ 70,403, 70,404 (S.D.N.Y. 1993).

86. Pursuant to the Primestar and Viacom decrees, substantial annual reporting requirements are imposed on the settling defendants. For example, each of the Primestar Partners and Viacom are required annually to provide to the forty states a verified written report of their compliance with the terms of the respective decrees. The report must include for each reporting entity, where applicable, the following:

- a. a list of all programming services in which the entity has an interest and the extent of any such interest as of the date of the report;
- b. a list of all national programming services with which the entity has entered into company-wide distribution agreements during the year in which the report is filed;
- c. a list of all programming services for which the entity has exclusive distribution rights, in whole or in part, as of the date of the report; and
- d. a list of all programming and cable assets subject to the decrees sold or otherwise transferred during the year with respect to which the report is filed, setting forth the identity of the purchaser or transferor and the percent of the cable system and/or programming assets of the ultimate parent of the entity that were sold or otherwise transferred.<sup>92</sup>

87. The decrees further provide, however, that any information provided to the states under the terms of the decrees shall be kept confidential, and may only be used in judicial proceedings to enforce the decrees by the states upon five days' notice to the relevant party, who may seek a protective order from the court to prevent the information from being used in open court.<sup>93</sup> Thus, it does not appear that the Commission will have access to any of the information that the Primestar Partners and Viacom have agreed to provide annually to the forty states. Nevertheless, it may be useful for the Commission itself to gather this or similar information, not only from these entities, but from all vertically integrated entities governed by the program access and carriage agreement provisions. Commenters are requested to respond to this suggestion.

88. Reliance on information gleaned through the

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<sup>92</sup> See Section VIII-B of both the Primestar Consent Decree and the Viacom Consent Decree, 1993-2 Trade Cases ¶¶ 70,403, 70,404.

<sup>93</sup> See Section XI of both Viacom and Primestar Decrees, 1993-2 Trade Cases ¶¶ 70,403, 70,404.

Commission's formal program access complaint process alone may not yield a complete picture of potential and actual anticompetitive actions or behavior relating to program access. Therefore, for purposes of supplementing our annual reporting to Congress, and determining the adequacy of our enforcement procedures, we invite commenters to suggest mechanisms for our receipt of such evidence of marketplace behavior. Specifically:

(a) Could some type of anonymous reporting procedure be developed, or would it be too susceptible to abuse?

(b) What information should the Commission request, and how should the Commission follow up on anonymous allegations, to facilitate development of an informed opinion regarding the allegedly anticompetitive practice(s)?

89. Finally, the Commission is sensitive to the fact that some information that could be requested may include proprietary or otherwise confidential information or data.<sup>94</sup> We request that commenters specifically address such concerns and provide suggestions as to how the Commission should gather, examine, protect or release such information/data. Where confidential information must be collected, we seek comment on methods for protecting individual confidentiality.

## **VII. Procedural Matters**

90. This NOI is issued pursuant to authority contained in Sections 4(i), 4(j), 403, and 628(g) of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 29, 1994**, and reply comments on or before **July 29, 1994**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

91. For purposes of this proceeding, because of its relationship to other pending and proposed rule making proceedings, the non-restricted notice and comment *ex parte* rules


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<sup>94</sup> See 47 C.F.R. § 0.459.

will be applied. Under these rules, ex parte presentations are permitted except during the Sunshine Agenda period. See generally, 47 C.F.R. Section 1.1206(a). The Sunshine Agenda Period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written ex parte presentation must provide on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral ex parte presentation that presents data or arguments not already reflected in the person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of oral presentation, a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

92. Further information on this proceeding may be obtained by contacting Nina M. Sandman or Diane Hofbauer at (202) 416-0856 in the Competition Division of the Cable Services Bureau.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## **APPENDIX A**

**APPENDIX C**

**HORIZONTAL CONCENTRATION, VERTICAL INTEGRATION AND PROGRAM ACCESS**

**TABLE I**

**CURRENT CONCENTRATION OF CONTROL OF THE CABLE TELEVISION INDUSTRY 1/**

<u>Rank</u>	<u>Company</u>	<u>Share of Top 50 2/</u>	<u>Share of Total Industry 3/</u>
1	TCI	24.73%	22.16%
2	Time Warner	12.92	11.58
3	Comcast Cable	9.25	8.29
4	Continental Cablevision	5.39	4.83
Top 4		52.29	46.86
5	Cox Cable	3.38	3.03
6	Cablevision Systems	3.17	2.84
7	Jones Intercable*	3.06	2.74
8	NewChannels	2.53	2.27
Top 8		64.43	57.74
9	Times Mirror*	2.35%	2.10%
10	Cablevision Industries*	2.17	1.95
Top 10*		68.95	61.79
Top 25*		88.80	79.58
Top 50*		100.00	89.60

HHI assuming the top 50 companies represent the whole industry = 975\*\*

Gini Index for top 50 companies = 0.64\*\*

1/ As part of this Inquiry, the Commission requested certain updated information, including subscriber counts, from the top nine MSO's. This table was generated using that information, other comments filed in the Inquiry, and the top 50 MSO list from Broadcasting, December 11, 1989, page 42. The analysis has been adjusted to reflect the ATC/Time Warner merger.

2/ Total number of subscribers for the top 50 MSOs is 47,705,561. Information on the top 50 MSOs is used to determine the HHI.



3/ According to Broadcasting, March 26, 1990, at 16, the total number of cable subscribers is 53,238,000. Data prepared by Broadcasting and industry sources.

\* Updated subscriber counts for these MSOs were unavailable and therefore estimated. To obtain the 1990 subscriber counts, the 1989 subscriber counts for these MSOs were adjusted upward by a factor of 1.046, which represented the overall growth factor in cable subscribership (53,238,000 divided by 50,897,080 = 1.046). The 1989 subscriber count was obtained from Broadcasting, December 11, 1989, at 42. This adjustment compensates for the continuing growth of the cable industry as a whole and prevents us from overrepresenting the top MSOs' share of the industry.

\*\* If data were available for the entire industry, the indices would be lower. A lower value indicates less concentration. Therefore, the analysis based on only 50 companies maximizes the estimate of industry concentration.

TABLE II

**CHANGES IN CONCENTRATION OF CONTROL OF THE CABLE INDUSTRY  
WITHIN THE TOP 50 COMPANIES <sup>1/</sup>**

	<u>1972</u>	<u>1975</u>	<u>1979</u>	<u>1982</u>	<u>1984</u>	<u>1985</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Top Co. Share	15.0	15.3	11.6	11.1	10.7	12.4	24.8	25.8	24.7
Top 4 Share	35.9	37.3	34.3	37.3	33.6	34.3	45.5	50.4	52.3
Top 8 Share	53.4	54.0	52.1	54.6	51.8	50.6	58.4	63.0	64.4
Top 10 Share	59.6	59.3	58.0	60.3	58.0	56.8	63.7	67.7	69.0
Top 25 Share	83.2	82.7	83.0	83.8	82.4	82.9	85.5	88.4	88.8
HHI	524	533	468	507	457	464	868	1000	975
Gini Index	.52	.52	.49	.53	.50	.51	.59	.63	.64

TABLE III

**CHANGES IN CONCENTRATION OF CONTROL OF THE CABLE INDUSTRY  
BASED ON TOTAL SUBSCRIBERS <sup>1/</sup>**

	<u>1972</u>	<u>1975</u>	<u>1979</u>	<u>1982</u>	<u>1984</u>	<u>1985</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Top Co. Share	9.9	10.4	8.4	8.7	9.2	9.0	20.9	22.2	22.2
Top 4 Share	23.9	25.2	24.9	29.3	28.7	24.9	38.4	43.4	46.9
Top 8 Share	35.4	36.5	37.8	42.8	44.2	36.8	49.3	54.2	57.7
Top 10 Share	39.6	40.1	42.1	47.4	49.5	41.3	53.8	58.3	61.8
Top 25 Share	55.2	56.0	60.3	65.8	70.2	60.7	73.1	76.1	79.6
Top 50 Share	66.4	67.8	72.7	78.5	85.2	72.3	84.5	86.2	89.6

<sup>1/</sup> Data for 1990 from Table I above. Data for 1989 calculated from information appearing in Broadcasting, December 11, 1989, at 42. Data for 1988 and 1985 calculated from information appearing in Broadcasting, May 2, 1988, at 36, and December 2, 1985, at 37, respectively. Data for 1984 calculated from information in Television & Cable Factbook Volume 52 at 1726 and Volume 53 at 1385 and Television Digest 1985, Cable and Station Coverage Atlas, at 4. Other data taken from 1982 Report and Order in Docket No. 18891, 91 FCC 2d 46 (1982), Appendix A.

Table IV

**NATIONAL CABLE PROGRAMMING NETWORKS  
WITH CABLE OPERATOR OWNERSHIP/EQUITY <sup>1/</sup>**

<u>Service</u>	<u>Began</u>
AMC (American Movie Classics)	10/84
BET (Black Entertainment Television)	1/80
Bravo	2/80
CBN Family Channel	5/77
CNBC (Consumer News and Business Channel)	4/89
CNN (Cable News Network)	6/80
C-SPAN I	3/79
C-SPAN II	6/86
Cable Value Network	5/86
Cinemax	8/80
The Discovery Channel	6/85
The Fashion Channel (TFC)	10/87
HBO	12/75
Headline News	1/82
Lifetime	2/84
Mind Extension University	11/87
MTV	8/81
The Movie Channel	12/79
Movietime	7/87
Nickelodeon	4/79
NICK at Nite	7/85
The Nostalgia Channel	2/85
QVC Network	11/86
Request Television	11/85
Request Television 2	7/88
Shop Television Network	10/87
Showtime	7/76
SportsChannel America	1/89
SuperStation TBS	12/76
TNT (Turner Network Television)	10/88
The Travel Channel	2/87
VH-1	1/85
Viewers Choice 1	11/85
Viewers Choice 2	6/86
VISN (Vision Interfaith Satellite Network)	9/88

<sup>1/</sup> This table was derived from Benjamin Klein, "The Competitive Consequences of Vertical Integration in the Cable Industry," (Klein study) June 1989, which was submitted as part of NCTA's comments. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

Table V

**NATIONAL CABLE PROGRAMMING SERVICES  
WITH NO CABLE OPERATOR OWNERSHIP INTEREST <sup>1/</sup>**

<u>Service</u>	<u>Began</u>
A&E Cable Network (Arts & Entertainment)	2/84
ASTS Satellite Network Television	5/84
Alternate View Network	10/85
American's Value Network	3/87
Cable Video Store	1/85
Country Music Television	3/83
The Disney Channel	4/83
ESPN (Entertainment & Sports Prog. Network)	9/79
EWTN (Eternal Word Television Network)	8/81
Family Guide Network	6/86
Family Net (formerly Liberty Broadcasting)	6/80
Financial News Network (FNN)	11/81
FNN/SCORE	4/85
FNN/TelShop	8/86
Galavision/ECO	10/79
Hit Video USA	12/85
Home Shopping Network I	7/85
The Inspirational Network	4/78
International Television Network	1/88
KTLA	3/88
KTVT	7/84
The Learning Channel (TLC)	10/80
TNN (The Nashville Network)	3/83
National Jewish Television	5/81
The Playboy Channel	11/82
The Silent Network	2/84
TBN (Trinity Broadcasting Network)	4/78
Univision (formerly SIN Television Network)	9/76
USA Network	9/80
The Weather Channel	5/82
WGN	11/78
WPIX	5/84
WSBK	2/88
WWOR	4/79
Zap Movies (formerly Telstar)	11/86

<sup>1/</sup> This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

Table VI

**Major MBO Cable Network Ownership 1/**  
**(as of 12/31/89) 2/**  
 (figures are percentages of attributable ownership  
 rounded to tenths of a percent)

Cable Program Service	TCI	Viacom	<Time Warner> ATC Warner	Conti- nental	Cox	Com- cast	Cable- Vision	New Chan.*
Am. Movie Ccls.	50.0	-	-	-	-	-	50.0	-
BET TV, Inc.	14.3	-	<14.3a/>	-	-	-	-	-
Discovery Ch.	49.2b/	-	-	-	24.6	-	-	24.8
Fashion Ch.	36.6b/	-	-	-	-	-	-	-
Int'l Ca. Tech.	11.7	-	-	-	-	-	-	-
Movietime Ch.	10.5	-	11.0	44.0	11.0	11.4	-	11.3
Netlink USA	80.0	-	-	-	-	-	-	-
PA Educ. Comm.	11.7	-	-	-	-	-	-	-
Prevue Guide	20.0	-	-	-	-	-	-	-
Prime Time Inc.	35.0	-	-	-	12.5	-	-	12.5
QVC Network	22.7b/	-	9.3	25.7	e/	13.0c/	-	-
So. Sat. Sys.	100.0	-	-	-	-	-	-	-
Think Ent.	37.5	-	-	-	-	-	-	-
Turner B/C Sys.	14.5b/	e/	-	18.1	e/	-	-	-
XPress Info.	100.0	-	-	-	-	-	-	-
KBL Ent.	100.0	-	-	-	-	-	-	-
TCI N.W. CATV	100.0	-	-	-	-	-	-	-
Affil. Reg. Com.	60.0	-	-	-	-	-	-	-
Raycom Partners	50.0	-	-	-	-	-	-	-
Sunshine Net.	56.1	-	9.6	-	18.0	6.6c/	-	-
Showtime	d/	100.0	-	-	-	-	-	-
The Movie Ch.	-	100.0	-	-	-	-	-	-
MTV	-	100.0	-	-	-	-	-	-
Nickelodeon	-	100.0	-	-	-	-	-	-
VH-1	-	100.0	-	-	-	-	-	-
Lifetime	-	33.0	-	-	-	-	-	-
HA! Comedy Net.	-	100.0	-	-	-	-	-	-
Pacific Spts.	50.0	50.0	-	-	-	-	-	-
Prime Spts. NW	60.0	40.0	-	-	-	-	-	-
Pay-P/View Net.	-	11.0	16.7	-	12.0	12.5	11.1c/	11.1
Info Channel	-	-	-	-	-	-	-	5.7
HBO	-	-	<100.0a/>	-	-	-	-	-
Cinemax	-	-	<100.0a/>	-	-	-	-	-
Video Jukebox	-	-	-	-	-	-	-	16.7
Z - Ch.	-	-	-	-	33.0	-	-	-

1/ These data are culled from responses to letters sent to these individual companies requesting data with respect to their vertical interests. The letters were sent by the Chief, Mass Media Bureau on December 29, 1989.

Cable Program Service	TCI	Viacom	<Time Warner> ATC	Warner	Conti- nental	Cox	Com- cast	Cable- Vision	New Chan.*
Amer. Shop Ch.	-	-	-	-	-	30.0	-	-	-
Spotlight	-	-	-	-	-	20.0	-	-	-
Bravo	-	-	-	-	-	-	-	50.0	-
CNBC	-	-	-	-	-	-	-	50.0	-
News 12 Long I.	-	-	-	-	-	-	-	49.5	-
PRISM	-	-	-	-	-	-	-	50.0	-
SprtsCh. Amer.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Chi.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Fla.	-	-	-	-	-	-	-	50.0	-
SprtsCh. L.A.	-	-	-	-	-	-	-	50.0	-
SprtsCh. N.E.	-	-	-	-	-	-	-	50.0	-
SprtsCh. N.Y.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Ohio	-	-	-	-	-	-	-	50.0	-

\* Includes NewChannels affiliated companies Metrovision, Inc. and Vision Cable Communications, Inc.

a/ Time Warner controls the indicated percent of this cable program service. Time Warner owns 82% of ATC and 100% of Warner Cable.

b/ This is the ownership figure for this cable program service as indicated in the acquisition section of TCI's letter. TCI holds a higher percentage than indicated of warrants or class B and C stocks for this cable service.

c/ Comcast supplied these percentage figures in a follow-up letter dated 2/15/90. Comcast has a beneficial ownership in the QVC Network of 28.1%.

d/ TCI has a 50% purchase of Showtime pending.

e/ This company has less than 5% interest in these cable networks.

2/ TCI has recently purchased a financial interest in the Family Channel. TCI has also announced its intention to spin off its programming interests. See letter dated January 31, 1990, to Roy J. Stewart, Chief, Mass Media Bureau from John M. Draper, Vice President and General Counsel of TCI.

Table VII

**VERTICAL CONNECTION BETWEEN MAJOR CABLE  
PROGRAMMING NETWORKS AND CABLE SYSTEM OPERATORS <sup>1/</sup>**

<u>Programming Network (top 25)</u>	<u>Subscribers (millions)</u>	<u>MSOs with Ownership/Equity Interest in Network</u>	<u>Date Began</u>
ESPN	55.9	None	9/79
CNN	54.4	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), <u>et al.</u>	6/80
SuperStation TBS	54.0	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), <u>et al.</u>	12/76
USA Network	51.5	None	4/80
Nickelodeon/NICK at Nite	50.8	Viacom (100%)	4/79, 7/85
MTV	50.4	Viacom (100%)	8/81
The Nashville Network	50.0	None	3/83
C-SPAN	49.7	2/	3/79
The Discovery Channel	49.7	TCI(49.2%), Newhouse(24.8), Cox (24.6)	6/85
The Family Channel	49.1	TCI(17%)	4/77
Lifetime	47.0	Viacom(33%), Hearst(33%)	2/84
TNT	44.5	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), <u>et al.</u>	10/88
A&E Cable Network	44.0	None	2/84
The Weather Channel	43.0	None	5/82
Headline News	41.8	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), <u>et al.</u>	1/82
Video Hits-One	34.6	Viacom (100%)	1/85
QVC Network	33.9	TCI(22.7%), Time-Warner(25.7%), Comcast (est.16%)	11/86
Financial News Network	33.8	None	11/81
WGN	30.0	None	11/78
BET	27.0	TCI(14.3%), Time-Warner (through HBO 14.3%)	1/80
American Movie Classics	26.0	TCI(50.0%), Cablevision(50.0%)	10/84
FNN/Sports	22.3	None	4/85
C-Span II	20.7	2/	6/86
The Learning Channel	20.0	None	10/80
Home Shopping Network I	19.9	None	7/85

<sup>1/</sup> This table was derived from Cable Television Developments, NCTA Research & Policy Analysis Department, May 1990; data compiled from responses to FCC questions to cable operators and services; Tables IV, V, and VI.

<sup>2/</sup> Cable affiliates provide 95 percent of the funding for C-SPAN, but have no ownership or program control interests.

Table VIII

**VERTICAL INTEGRATION: TOP FIFTEEN MAJOR CABLE  
PROGRAMMING NETWORKS (BY RATING) 1/**

<u>Rank</u>	<u>Service</u>	<u>Date Began</u>	<u>MSOs with Ownership/Equity</u>
1	TBS	12/76	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), <u>et al.</u>
2	USA	9/80	none
3	ESPN	9/79	none
4	CNN	6/80	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), <u>et al.</u>
5	TNT	10/88	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), <u>et al.</u>
6	TNN	3/83	none
7	Discovery Channel	6/85	TCI(49.2%), Cox(24.6%), Newhouse(24.8%)
8	NICK at Nite	7/85	Viacom (100%)
9	Lifetime	2/84	Viacom(33%), Hearst(33%)
10	Family Channel	5/77	TCI (17%)
11	A&E	2/84	none
12	MTV	8/81	Viacom (100%)
13	Headline News	1/82	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), <u>et al.</u>
14	BET	1/80	TCI(14.3%), Time-Warner(14.3%) through HBO)
15	Weather Channel	5/82	none

1/ This Table was derived from Nielsen's First Quarter CNAD Report, as presented in Broadcasting, June 18, 1990, at 52; data compiled from responses to FCC questions to cable operators and services; Tables IV, V, and VI.



Table IX

## Access to Program Networks by Competitive Media

(Y = able to obtain; N = unable to obtain)

	(HSD)	(<-----MDS 1/----->)							SMATV
	NRTC a/	CableMax	Peo.Ch.	Cleve.Wire.	Tele/PR	WCTV	MAGNAVISION	NPCA	
HBO	Y	N f/	N	-	-	-	N	-	
Cine	Y	N f/	N	-	-	-	-	-	
Show	N b/	N f/	N	-	-	-	N k/	-	
TMC	N b/	N f/	N	-	-	-	-	-	
AMC	Y c/	-	N g/	No resp	-	-	-	N t/	
MTV	N d/	-	-	-	-	-	No resp	u/	
VH1	N d/	-	-	-	-	-	-	-	
Dis *	Y	-	N	-	-	-	l/	-	
FNN *	N d/	-	-	-	-	-	-	-	
NICK	Y	-	-	-	-	-	No resp	-	
TNT	N d/	N f/	N	-	-	-	N m/	-	
TNN *	Y	-	-	-	-	-	-	-	
CNBC	No resp	-	-	-	-	-	-	-	
CNN	Y	-	-	-	-	-	-	-	
A&E *	-	-	-	No resp	-	-	N n/	-	
ESPN *	e/	-	Y h/	-	-	N l/	N o/	-	
SPTS CH	-	-	N	-	-	-	p/	-	
HSPTS	-	-	N	-	-	-	-	-	
USA *	-	-	-	-	N l/	-	N q/	v/	
MovT	-	-	-	-	-	-	N r/	-	
Life	-	-	-	-	-	-	s/	-	

\* Program network is not vertically integrated with an MSO.

a/ NRTC states that it must pay, on average, 460% more for programming than small cable companies (i.e. \$10 vs. \$2.25 for an 18 channel package).

b/ NRTC states that it has made an offer to Viacom for the service. NRTC has yet to receive a response.

c/ A written proposal from AMC is currently under review.

d/ NRTC has been unable to obtain this service after reasonable and repeated requests. NRTC does not define reasonable or repeated.

e/ NRTC states that ESPN offered a contract to provide service in "restricted" territories. ESPN, in its comments, defends exclusivity as a valuable and time-tested component of the television business. ESPN states that it does not generally grant exclusive distribution rights.

f/ CableMaxx has yet to secure access to this service despite its offers to post letters of credit equal to several months billing.

g/ Cablevision Systems Corp., in reply comments, states that it supplies its programming to several wireless cable operators including Peo. Ch.

h/ People's Choice is not authorized to distribute ESPN through wireless cable. People's Choice is limited to distributing ESPN only via its SMATV facilities. See footnote e.

l/ Telecable of Puerto Rico had provided its subscribers with USA Network for several months. However, USA cancelled the agreement, claiming that USA had a policy of not selling to wireless and had mistakenly believed that Telecable was a hard wired system. In their March 28, 1990, letter response to follow up questions from the Los Angeles field hearing, USA